SUPREME COURT, U. S.
No. 122
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In the Supreme Court of the United States

OCTOBER TERM, 1968

BETTY GANNETT TORMEY, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The court of appeals wrote no opinion. Its order dismissing for want of jurisdiction appears at Pet. App. 17. The opinion of the Board of Immigration Appeals denying petitioner's motion for reconsideration of the order dismissing her appeal from the order of deportation (R. 30; A.R. 8)[1] appears at Pet. App. 18.

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[1] "R." refers to the record of the proceedings in the court of appeals. "A.R." refers to the numbered tabs on the documents constituting the administrative record; where the reference is to a particular page of a document, the page number follows.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1968 (R. 43; Pet. App. 17). The petition for a writ of certiorari was filed on May 23, 1968. Jurisdiction is conferred on this Court by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the requirement of Section 106(a) of the Immigration and Nationality Act that a petition for review of a final order of deportation be filed within six months of the entry of the order or of the effective date of the section (whichever is later) can be circumvented by filing with the administrative authorities, years after the expiration of the period prescribed, a motion to reconsider the deportation order, and then attempting to litigate the validity of the original order on petition for review of the order denying reconsideration.

STATUTE INVOLVED

Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)), as added by the Act of September 26, 1961, § 5(a), 75 Stat. 651, provides in pertinent part:

> Sec. 106. (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq. [now 28 U.S.C. 2341-2351]), shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made

against aliens within the United States pursuant to administrative proceedings under section 242 (b) of this Act [8 U.S.C. 1252(b)] or comparable provisions of any prior Act, except that—

> (1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section [October 26, 1961], whichever is the later.

* * * *

STATEMENT

Petitioner is a 61-year-old native of Poland who was admitted to the United States in 1914 at the age of eight. Except for several months spent in Europe in 1927 and 1928, she has resided in this country ever since (A.R. 11, p. 2; A.R. 13, pp. 2-3). On October 15, 1951, pursuant to what is now Section 241 (a)(6)(C)(i) of the Immigration and Nationality Act (8 U.S.C. 1251 (a)(6)(C)(i)),[2] she was ordered deported as an alien who, after entry, had been a member of the Communist Party of the United States (A.R. 13).[3] The order became final on October 31,

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[2] The deportation order was actually entered under Sections 1(2)(C)(i) and 4(a) of the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008 (8 U.S.C. (1946 ed., Supp. V) 137(2)(C)(i) and 137-3(a)). The relevant provisions have been superseded without pertinent change by the cited provision of the present Immigration and Nationality Act.

[3] In an affidavit filed with the court below in the present proceeding, petitioner acknowledged that she had been an active member of the Party for many years prior to the issuance of the deportation order, had served on its leading committees, and had continued her active membership to the present time (R. 41). She was one of the members of the

1952, when it was sustained by the Board of Immigration Appeals (A.R. 11). Judicial review was not sought (R. 34). Because of the refusal of Poland, the country to which she was ordered deported, to receive petitioner, the United States has not been able to enforce the order (see Pet. 4, n. 2).[4]

On July 19, 1967, petitioner filed with the Board of Immigration Appeals a motion that it reconsider its 1952 order sustaining the deportation order (A.R. 10). The stated basis of the motion was that Section 241(a)(6)(C)(i)—the statutory basis for the order—is unconstitutional (A.R. 10, pp. 1-2). Acknowledging that the constitutionality of the section had been sustained by this Court in *Galvan* v. *Press*, 347 U.S. 522, petitioner argued that the decision was indefensible and, if reexamined, would be overruled (A.R. 10, p. 3). On October 9, 1967, the Board denied the motion on the ground that it was "not within the jurisdiction of this Board * * * to pass upon the constitutionality of a statute which we administer" (R. 30; A.R. 8; Pet. App. 18).[5]

Party whose convictions for conspiring to violate the Smith Act, 18 U.S.C. 2385, were affirmed in *United States* v. *Flynn*, 216 F. 2d 354 (C.A. 2), certiorari denied, 348 U.S. 909 (R. 36-37). She is currently the editor of *Political Affairs*, the Party's theoretical journal (R. 41).

[4] There is no prospect, moreover, although the record does not specifically so indicate, that the now 15-year-old deportation order can be enforced, either in the immediate or foreseeable future.

[5] As petitioner notes (Pet. 4), the Board "*sua sponte*, also reexamined the evidence" and determined that it was in any event clear from the record that petitioner's membership in the Communist Party had not been "a nominal one which

On November 22, 1967, relying on Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) (pp. 2-3, *supra*), petitioner filed in the court of appeals a petition for review of the Board's October 9, 1967, order denying the motion for reconsideration (R. 28-29). Like the motion addressed to the Board, the petition challenged the constitutionality of the statute on which the deportation order had been predicated (R. 29). The Immigration and Naturalization Service moved to dismiss the petition for lack of jurisdiction (R. 32-38).[6] The Service noted that the petition for review, while in form seeking review of the denial of the motion for reconsideration, was in

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would bring it within the rule set forth in *Galvan* v. *Press* (347 U.S. 522) and *Rowoldt* v. *Perfetto* (355 U.S. 115)" (R. 30; A.R. 8; Pet. App. 18). See note 3, *supra*, p. 3.

[6] Alternatively the Service asked that the proceeding be remanded to the Board of Immigration Appeals for reconsideration of the deportation order in the light of the new standard of proof ("clear, unequivocal, and convincing evidence") by which this Court, in *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276, 285, had recently held that deportation orders must be supported (R. 35-38). Petitioner opposed the request on the ground that the evidence in her case had clearly met the *Woodby* standard and that remand for the purpose suggested was therefore unnecessary (R. 40). (Petitioner had also opposed the Service's earlier motion that the Board reopen the deportation proceeding in order to bring the record current, to enable the Board to reappraise the evidence in the light of the *Woodby* standard, and to permit petitioner to apply for such discretionary relief from deportation for which she might deem herself qualified (A.R. 6-7).) In light of its decision to dismiss for lack of jurisdiction, the court below had no occasion to consider the alternative request. Petitioner now reaffirms her position that her acknowledged, continuing, active membership in the Communist Party removes any issue about the sufficiency of the evidence to satisfy the statute.

substance a challenge to the order of deportation itself, based on the alleged invalidity of the statute on which the order was based (R. 34-35).[7] Further pointing out that a petition for review of a deportation order is required by Section 106(a) to be filed within six months of the order or of the effective date of the section (whichever is later) and that the petition in this instance had been filed more than 15 years after the entry of the order and more than six years after the section had become effective, the Service contended that the petition was barred by untimeliness (R. 34, 38).

On April 29, 1967, the court granted the Service's motion and dismissed the petition for lack of jurisdiction (R. 43; Pet. App. 17).

ARGUMENT

The court of appeals was correct in holding that it lacked jurisdiction to entertain the petition for review. It is therefore unnecessary for this Court to reach the second question which petitioner seeks to raise—whether *Galvan* v. *Press*, 347 U.S. 522, upholding the constitutionality of Section 241(a)(6)(C)(i) of the Immigration and Nationality Act, should be overruled.[8]

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[7] The Service pointed out that petitioner could not "seriously challenge" the correctness of the denial of the motion for reconsideration since it was indisputably beyond the Board's power to hold invalid an Act of Congress which it administers (R. 34-35). Petitioner makes no attempt before this Court to suggest that there is any basis for attacking the Board's reasons for denying reconsideration.

[8] Petitioner has specifically disclaimed any contention, in light of her admittedly "active", current membership in the

Section 106(a) of the Immigration and Nationality Act—which provides the exclusive procedure for judicial review in this field and on the basis of which petitioner invoked the jurisdiction of the court below—provides that a petition for review of a final order of deportation may be filed "not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later." The challenged deportation order became final on October 31, 1952, fifteen years prior to the filing of the petition for review, and the section took effect on October 26, 1961 (see § 5(b), 75 Stat. 653), six years before she filed her petition for review. While the petition for review purported to seek review of the Board's denial of the motion for reconsideration, it is evident, as the court of appeals recognized and as we have seen (note 7, *supra*, p. 6), that the real challenge was solely to the deportation order itself. The only ground relied on in seeking reconsideration was that the Board should reconsider the deportation order in the light of petitioner's contention that the statute on which it was based is unconstitutional. Since such a ruling is not seriously expected from the Board with respect to a statute which it administers, it is evident

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Party, that the evidence was insufficient to bring her within the statute. Since *Galvan*, of course, the Court has made the "membership" test of the statute more stringent, see *Rowoldt* v. *Perfetto*, 355 U.S. 115, 120; *Gastelum-Quinones* v. *Kennedy*, 374 U.S. 469, 476-477, so that it clearly comports with recent expression of constitutional standards. *E.g.*, *United States* v. *Robel*, 389 U.S. 258, 265-266. In denying reconsideration, the Board found that the evidence met these restrictive tests (Pet. App. 18).

that the sole purpose of the motion for reconsideration was to use it as a device to circumvent the explicit and unqualified time limitation on petitions for review set by Congress. Even a good-faith motion to reopen or reconsider, if filed *after* the time for seeking review of the deportation order has expired, cannot revive the right to seek such review. *Lopez* v. *Immigration and Naturalization Service*, 356 F. 2d 986 (C.A. 3), certiorari denied, 385 U.S. 839; *Chul Hi Kim* v. *Immigration and Naturalization Service*, 357 F. 2d 904, 906 (C.A. 7).[9]

Petitioner's reliance (Pet. 5) on *Giova* v. *Rosenberg*, 379 U.S. 18, and *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276, and the government's position in those cases, is misplaced.

As this Court recently explained in *Cheng Fan Kwok* v. *Immigration and Naturalization Service* (No. 638, October Term, 1967, issued June 10, 1968) (slip op. pp. 5-6), *Giova* involved a question quite distinct from that here at issue; there, the question was whether the court of appeals was the proper *forum* for review of decisions denying reconsideration of deporta-

[9] While review of the deportation order proper is foreclosed in such circumstances, review may be had of the denial of the ancillary motion if the petition is filed within six months. *Giova* v. *Rosenberg*, 379 U.S. 18; *Lopez* v. *Immigration and Naturalization Service, supra; Chul Hi Kim* v. *Immigration and Naturalization Service, supra*, at 907. And see discussion in the text immediately following. But the issue in such a proceeding is solely whether, under all the circumstances, it was an abuse of discretion to deny the motion. Petitioner does not, and obviously could not, contend that it was an abuse of discretion for the Board to deny the motion for reconsideration in this case.

tion orders. With the agreement of the government, the Court held in *Giova* that an order of the Board refusing to reopen a deportation proceeding or to reconsider a final order of deportation is reviewable in a court of appeals under Section 106(a) by a petition for review filed within six months of the denial of the motion. There is, however, nothing in the Court's brief *per curiam* order in the case which supports petitioner's claim that the filing of a motion to reopen or reconsider revives the right of the alien to obtain review of the deportation order proper once the right to such review has expired. The government, indeed, in its brief to this Court in the *Giova* case, while urging the interpretation of Section 106(a) which the Court accepted, expressly disavowed the interpretation which petitioner now urges. "It should be noted," we there said (Brief for Respondent, No. 23, Oct. Term, 1964, p. 21, n. 20),

> that the construction of Section 106(a) suggested by the government does *not* permit circumvention of the six-month limitations period prescribed for the filing of petitions for review (§ 106(a)(1) * * *). If, after entry of a final order of deportation, an alien fails to seek review of the order within six months, he cannot thereafter revive his right to review of that order merely by filing a motion to reopen the proceedings. Review under Section 106(a) of the denial of a motion to reopen is limited, in other words, under the government's interpretation, to the propriety and legality of the order of denial itself. * * * [Emphasis in the original.][10]

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[10] We further noted that while the petitioner in *Giova* had in fact not sought review of the deportation order proper,

Woodby, like the present case, involved a petition for review which had been filed more than six months after the Board of Immigration Appeals upheld the deportation order (thus making it final) but within six months of the denial of a motion to reconsider. Unlike this case, however, the motion for reconsideration in *Woodby* was filed within six months of the Board's affirmance of the deportation order—at a time when the statutory period within which review must be sought had not yet expired.[11] In *Woodby*, the Service argued in the court of appeals that because of the six-month limitation imposed by Section 106 (a) (1) the court's review authority was limited to the propriety of the denial of the motion for reconsideration—whether, in other words, the denial of the motion had involved an abuse of discretion. 370 F. 2d at 992. The court of appeals found it unnecessary to consider the suggested limitation on its jurisdiction because it found without merit the attack on the deportation order as well as the challenge to the denial of the motion for reconsideration. *Ibid.* In this Court, noting that another court of appeals had in the

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he *could* have done so (notwithstanding that the order had been entered more than four years previously) because of the fortuitous circumstance that the petition for review had been filed within six months of the effective date of Section 106(a) (Brief, p. 20, n. 19).

[11] The Board's order upholding the *Woodby* deportation order (by which the deportation order became final) was entered on March 8, 1963. The motion for reconsideration was filed prior to May 27, 1963, and denied on that date. 385 U.S. at 286, n. 20.

interim held[12] that it had jurisdiction to review the deportation order as well as the denial of the ancillary motion (there a motion to reopen), the Service abandoned its contention that *in circumstances similar to those presented* the courts are limited to reviewing the denial of the ancillary motion. Brief for Respondent, No. 40, October Term, 1966, p. 8, n. 3. This Court accepted the Service's concession, also citing *Bregman*. 385 U.S. at 286-287, n. 20.

That the government did not intend by its *Woodby* concession to retreat from its insistence in *Giova* that an alien who fails to seek review of a final deportation order within the time limit prescribed by Congress cannot revive his right to review merely by filing a motion to reopen or reconsider, and that this Court, by its acceptance of the concession, did not intend to give sanction to so facile a circumvention of the statutory limitation, is clear from the precisely enunciated holding of the *Bregman* decision, upon which both the concession and the Court's acceptance of it were predicated. What *Bregman* held was that, in the words of the opinion (351 F. 2d at 402-403),

> *if the motion to reopen before the Board is within six months of the final order of deportation and* the petition to this court is within six months of the denial of the motion (as it was in this case), this court has jurisdiction to review both the final order of deportation and the denial of the motion to reopen. [Emphasis added.][13]

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[12] *Bregman* v. *Immigration and Naturalization Service*, 351 F.2d 401 (C.A. 9).

[13] A further and equally clear indication that the government did not intend its *Woodby* concession to extend to a

This reasonable construction of Section 106(a)(1) gives due consideration both to the rights of the alien and to the time limit which Congress wrote into the section. It gives to the alien against whom a final order of deportation has been entered and who desires to seek judicial review an opportunity first to attempt to obviate the need for such review by promptly petitioning the administrative authorities to reconsider their decision (or to reopen the proceedings for some *bona fide* purpose, such as the presentation of additional evidence). In such a context it is quite reasonable to consider the resort to administrative relief as extending the time for seeking judicial review of the underlying order—review which was at the time equally available. As the Court recognized in *United States* v. *Healy*, 376 U.S. 75, 77—another case on which petitioner erroneously seeks to rely (Pet. 7)—enlargement of the time to take a case to the court of appeals when a petition for reconsideration is filed within that time is decisively distinguishable from "an attempt to rejuvenate an extinguished right to appeal."

The construction we urge is thus at once generous to the alien's right to review while remaining true to

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situation where, as here, the ancillary motion is filed *after* the time for petitioning for review of the deportation order has expired is the fact that immediately following its concession (Brief, p. 8, n. 3) the government cited as a "Compare" reference the case of *Lopez* v. *Immigration and Naturalization Service*, 356 F.2d 986 (C.A. 3), certiorari denied, 385 U.S. 839, in which (as noted at p. 8, *supra*) it had been held, in precisely these circumstances, that the filing of the ancillary motion does not revive the right to seek review of the principal order.

the spirit if not the letter of the time limit Congress has seen fit to impose. On the other hand, under the interpretation of Section 106(a)(1) which petitioner espouses, the statutory time limit can be circumvented with ease and becomes, in fact, nugatory. All that is necessary to evade it is for the alien—at any time and under any pretext—to petition the administrative authorities to reconsider their decision or to reopen the proceedings, and then, when, as expected, the motion is denied, to use the order of denial as a means of "rejuvenat[ing] an extinguished right." Clearly, nothing in either *Giova* or *Woodby* supports that construction.[14]

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[14] It is appropriate to note, however, that, while petitioner is thus foreclosed from seeking review of the deportation order at this time under the review procedure established by Section 106(a), there would be nothing to prevent her, if deportation ever becomes feasible and she is taken into custody for that purpose, from pursuing the habeas corpus remedy preserved under the Act for those in custody. See Section 106(a)(9) and (c) (8 U.S.C. 1105a(a)(9) and (c)). (We also brought this alternative to the Court's attention in our brief in the *Giova* case at p. 21, n. 20). Inasmuch as she has never previously sought judicial review of her deportation order, the validity of the order could be litigated in such a proceeding on any ground she might choose to advance. Cf. Section 106(c) (8 U.S.C. 1105a(c)). As we have previously indicated, however, there is no foreseeable prospect that the 15-year-old deportation order can be enforced.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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